

**APPLICATION FOR**

**DISTRICT COURT JUDGESHIP**

**Eighth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: Theresa L. Diekhans
  - a. What name do you commonly go by? Theresa
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED] Phone: [REDACTED]
4. Office Address: 24 Watson Lane, Great Falls, MT 59404  
Phone: 406-836-7655
5. Length of residence in Montana: 46 years
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
September 2003 to present	Great Falls	Montana

**B. EDUCATIONAL BACKGROUND**

7. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Great Falls High School	Great Falls, Mt	1987	HS diploma
University of Puget Sound	Tacoma , WA	1987 – 1988	
University of Montana	Missoula, MT	1989	
University of Great Falls	Great Falls, MT	1992	BS in Communication

Gonzaga Law School                      Spokane, WA                      2003                      JD

8. List any scholarships, awards, honors and citations that you have received:

Gonzaga gave me \$5000 need scholarship to attend law school.

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

No

### **C. PROFESSIONAL BACKGROUND AND EXPERIENCE**

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

Court or Administrative Body

Date of  
Admission

Montana Supreme Court & District Courts of Montana

October 2003

United States District Court for the District of Montana

October 2003

11. Indicate your present employment (list professional partners or associates, if any).

As of January 1 I am working as a sales associate for Aflac and exploring doing work as a solo practitioner.

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

Employer's Name

Position

Dates

Montana Attorney General's Office

Assistant Attorney General

10/2010 – 12/2015

Cascade County Attorney's Office

Deputy County Attorney

5/2005 – 10/2010

Smith Walsh Clark & Gregoire

Associate Attorney

5/2004 – 5/2005

Jardine Stephenson Blewett & Weaver

Associate Attorney

9/2003 – 5/2004

City of Spokane Attorney's Office

Student Legal Intern

9/2002 – 5/2003

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

While I have kept my license active and am exploring my options I have not completed any legal work since January 1, 2015. I have been working as a Sales Associate for Aflac while thinking on my legal career and exploring where I want to go with my legal training.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I am currently working as a sales associate for Aflac and exploring my interest in the law as of January 1, 2015. For the last seven years I worked primarily in the Dependency and Neglect area of the law as a prosecutor for both the Cascade County Attorney's office and the Attorney General's Office as a member of the Child protection unit. While I did prosecute three criminal cases while at the Cascade County Attorney's office 98% of my time was spent on the Dependency and Neglect cases representing the Department of Child and Family services.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I spent the first two years in private practice as an associate attorney primarily doing legal research and writing for the partners in the areas of family law, insurance defense, land use, and civil litigation. I then worked as the Civil Deputy Attorney for Cascade County working with the Cascade County Commissioners on civil issues with the County. I advised them on land use, human resource, water rights and conservation issues.

16. If you specialize in any field of law, what is your specialty?

Child abuse and neglect would be considered my specialty.

17. Do you regularly appear in court? Yes

What percentage of your appearance in the last five years was in:

Federal court	_____	%
State or local courts of record	100	%
Administrative bodies	_____	%
Other	_____	%

18. During the last five years, what percentage of your practice has been trial practice? 60%

19. How frequently have you appeared in court? 10 times per month on average.

20. How frequently have you appeared at administrative hearings?  
0 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	_____	%
Criminal	2	%
Other	98	%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

No

23. State the number of jury trials that you have tried to conclusion in the last ten years. 3

24. State the number of non-jury trials that you have tried in the last ten years.

I have conducted a number of parental termination hearings which I would say is a bench trial over the last seven years. I do not have an exact number but would say approximately 30. I have also conducted many contested show cause and adjudication hearings over the last seven years.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

I have had a number of cases in the dependency and neglect area over the last two years against a number of attorneys. I do not the captions to these cases as do to confidentiality and privacy issues with

these cases I do not have access to the database with all of the information. Following is a list of the Judge's I have appeared before in the last two years and attorneys I have tried these cases against.

Attorneys:

- Carl Jensen 410 Central Ave. Ste 506B, Great Falls, MT 59401 406-899-6696
- Lawrence LaFountain 615 2<sup>nd</sup> Ave. N 3<sup>rd</sup> Floor Great Falls, MT 59401 406-770-3200
- Jane Berger 615 2<sup>nd</sup> Ave. N 3<sup>rd</sup> Floor Great Falls, MT 59401 406-770-3200
- Eric Mills #1 5<sup>th</sup> St. N Great Falls, MT 59401 406-770-3200
- Meghan Lulf Sutton #1 5<sup>th</sup> St. N Great Falls, MT 59401 406-770-3200
- Jeffrey Sutton 417 Central Ave. Ste. 2B Great Falls, MT 59401 406-453-1673
- Craig Buehler 505 W Main Ste 210 Lewistown, MT 59457 406-538-2466
- Helen McCarthy 401 E Legion, Whitehall, MT 59759 406-287-3161
- Jeremy Yellin 419 4<sup>th</sup> Ave. Ste A Havre, MT 59501 406-265-3303

Judges:

- Judge Kenneth R. Neill 406-454-6897
- Judge Greg Pinski 406-454-6894
- Judge Loren Tucker 406-683-3745
- Judge Kathy Seeley 406-447-8205
- Judge Daniel A. Boucher 406-265-5481

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

All of my experience in the last five years has been in front of District Judges and have not appeared in front of any administrative boards or commissions.

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.

No. However I did training quarterly in 2013 and 2014 to the Child Protection Specialist on the law in Dependency and Neglect cases in Montana and preparing them for testifying in Court and writing affidavits.

#### **D. PROFESSIONAL AND PUBLIC SERVICE**

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Montana State Bar 10/2003 – Present

Cascade County Bar Association Treasurer 4/2004 – 3/2005

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

Big Brother's Big Sisters of Great Falls Board Member since 2003.

Cascade County Child Protection Team 5/2007 until December 2014.

Children's Alliance of Montana Advisory Board Member October 2010 until December 2014.

Children's Alliance of Montana Board Member May 2007 until October 2010.

30. Have you ever run for or held public office? If so, please give the details.

No.

31. Please explain your philosophy of public involvement and practice of giving your time to community service.

Public involvement and community service is necessary for a successful, well rounded community and a successful well rounded individual. For a person to truly be involved in their

community they must find ways to be involved and to give back. It has been my community involvement and service that has helped me find balance in my practice and in my life over the last years. Being involved in the community reminds me what an incredible town Great Falls is. There are amazing and wonderful people here that I would not know or have interacted with without getting involved. If all a person does is work and go home and receives all his or her news via newspapers and television than he or she does ends up with a negative outlook as to the world and their community. It takes being involved to truly recognize and understand their community and to be able to serve their community in whatever job they hold.

#### **E. PROFESSIONAL CONDUCT AND ETHICS**

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No.

36. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

No.

## **F. BUSINESS AND FINANCIAL INFORMATION**

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

Since January 1, 2015 I have been working as a sales associate for Aflac selling supplemental insurance.

38. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

As a sales associate for Aflac, the agreement is that the business is mine and I contact with Aflac to sell their products. If I am appointed to this judgeship I will no longer work on selling Aflac insurance.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

None

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain.

None.

41. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? ☒ Yes ☐ No

If not, please explain.

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?  
☐ Yes ☒ No

If yes, please explain.

43. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details.

No.

## **G. WRITING SKILLS**



44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

For the last five years I have been responsible for my own legal research and drafting of briefs as necessary in the dependency and neglect area. As many cases are appealed in this area I working on staying informed on all the cases as they were decided by the Court. I would research this area on a weekly basis. Most of the brief writing had to deal specifically with termination hearings and many times the same issues so after I drafted most of the briefs early on in my career in this area, most of my brief writing was updating new law and changes that came from the Montanan Supreme Court and legislature.

45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

In my area of practice I had to draft many Petitions and motions. However I did use templates that I helped to edit and draft for this area as there was information that remained the same and had to be included in every petition and motion. I did have to make them case and fact specific and ensure that I covered and included all of the necessary information and legal references.

46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

47. What percentage of your practice for the last five years has involved research and legal writing?  
30 %

48. Are you competent in the use of Westlaw and/or Lexis?

Yes. I have used primarily Lexis for the last four years and before that used primarily Westlaw so I feel comfortable using both of them. I did searches and almost a weekly basis for the last few years.

## **H. MISCELLANEOUS**

49. Briefly describe your hobbies and other interests and activities.

My family is my primary interest and hobby. I enjoy spending my time with them and watching my nieces and nephews in their various sports and music activities. I enjoy watching my sister coach her girl's basketball team. I enjoy just being with my family. I also enjoy watching sports. I enjoy almost any type of sports but particularly football, college basketball and baseball. I am also an avid reader and enjoy mysteries, science fiction and romance.

50. Describe the jobs that you have held during your lifetime.

- I managed two restaurant casinos in Glasgow Montana for five years. I set the schedules, hired and fired employees, managed the accounts, completed payroll, waitressed, cooked, and filled in wherever was necessary.
- I sold shoes at the Holiday Village Mall for one year.
- I sold office supplies for five years in Great Falls and then in Idaho when the company was purchased. I also managed the floor of the store for one year before it was bought out by the Idaho company and they moved me to Idaho.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

Given that I worked for the State of Montana my pro bono work was limited to the non-profit boards I was on. I provided legal advice and drafted letters for Big Brothers Big Sisters of Great Falls over the last 11 years as needed. I also helped to draft by-laws and human resource policies for Big Brothers Big Sisters of Great Falls and the Children's Alliance of Montana.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

My Mother has been the largest influence in my life on how I view how I should live and what I kind of person I should be and that holds true on my view our system of justice. My Mother was the hardest working person that I have ever known. She helped my father run our farm, raised seven children and was the head of her own family of brothers and sisters. The way she raised my brothers and sisters is how I view our justice system working at its best. She was always fair and honest with us. She did not use double standards or the boys will be boys line with my brothers. She was fair in that all of my siblings were held to the same standard by Mom. My Mother always listened to us and gathered all of the evidence before she gave her “ruling” on if we were in trouble or not. When I was in law school I first started to realize how her running of our home was so similar to the justice system. When I then started at the County Attorney’s Office she was my sounding board and her guidance was invaluable. It was about being fair, honest and striving to do my best. That is what the justice system is to me. When I started in the Dependency and Neglect arena she continued to be there to remind me my job was not to punish but to help and to support. That I was dealing with families in crises and that the system needed to help and not hinder the families. Even after I lost my Mother I still hear her in my head when I am struggling with justice and what justice means and I remember her many examples she set for me for years, that of listening, collecting the facts and evidence and responding with calm and patience and not anger and reaction. When I have followed her example I feel I have made the best and most judicious decisions and that is ultimately what justice is all about.

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

The most important quality in a district court judge is to be an active unbiased listener. The judge must be willing and able to listen with an open mind and to be able to apply what he or she hears in an unbiased way as only the law dictates. A good judge must also be able to balance his or her person feeling and emotions and ensure that he or she is applying the law to the evidence and not applying their

own personal thoughts and feelings. A good judge must also control their emotions and keep the Court room calm. Many cases and hearing already have heightened levels of emotions and feelings that could cause things to get out of control and the judge is the person who needs to control that atmosphere and keep the case in front of him or her on point. Therefore a judge must be an active listener and while a judge is human and has passion must be able to control their passion and remain calm and steady in the face of controversy and emotion.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

This is the most difficult balancing act a judge has. The flexibility in the law comes from the individual facts and evidence in the case. It is important to follow established precedence but it comes down to the individual facts and their application to the precedent. This takes again a judge who is actively listening and evaluating the facts and evidence before them in an unbiased and unemotional manner to ensure that the judge is applying the precedence correctly. There are rare times though where to truly do justice a judge will have to make the decision to utilize the facts and evidence and that flexibility to challenge the established precedence and make the tough call to go against this precedence. Those are decisions that led to the end of bad laws like segregation. This must be done though in a thoughtful, meaningful and dedicated manner with the correct facts and law. When a judge chooses to do this they must also be willing to face what the court above them does with that decision.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

When I decided to explore some changes in my career late last year, seeking a position as a judge was one I thought about if the opportunity arose. I was struggling with loving the law but not liking the practice of law last year and the last few months have reminded me that I love the law and I love our system of justice. It is not perfect because it involves human beings but it is the best system in the world.

Being a district court judge will allow me to continue to be part of a system I believe in and love and give me the balance to continue to love the law. I have thought hard on this decision to apply and I am ready to continue have this next role in this amazing system. I would also like to continue to serve this community and to protect this community to the best of my ability and I can do that as a district court judge.

56. What items or events in your career have distinguished you or of which you are most proud?

I am so proud of the work that I have done since I started practicing the law but particularly the work in the Dependency and Neglect area. This work was difficult, challenging, rewarding, and frustrating. This area of the law is very different than criminal prosecution and the civil realm. I was most proud when I was able to help a parent make the changes necessary to be a parent and to actually get their children back in their custody. I was also proud of a few cases where the parents were able to recognize what was best for their children and make that most difficult decision to put their children first. I worked hard for the Department of Child Services and most of all I worked hard for the children and the parents on my case load and I am proud of the work I did over the entire seven years.

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

It may appear that my experience has been limited to a narrow area of the law but the truth is that in the Dependency and Neglect area I also had to know and understand criminal law, guardianship law, family law, and the civil and criminal rules of evidence. I was often dealing with and working in many different areas of the law. I was also in court in front of judges quite a bit during the last seven years and have extensive courtroom experience due to the area of law that I have practice. You may also be questioning why I left the State at the end of the year, but I was feeling do to the stress and only doing

this work for the last seven years I was afraid I would start doing bad work and not giving my all and I wanted to ensure I left before that happened.

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

I am committed and dedicated to what I put my mind to. I come from a large family and this has taught me how to deal with many different personalities and opinions and any given subject. This has been the best education and training anyone can have to be a judge. My background has also taught me how to listen and to do my best to not react and to think before I engage. These are also important skills and lessons in being a judge.

#### **CERTIFICATE OF APPLICANT**

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 8th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

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(Date)

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(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by  
*5:00 p.m. on Wednesday, March 25, 2015.*

**Mail the signed original to:**

**Lois Menzies  
Office of Court Administrator  
P.O. Box 203005  
Helena, MT 59620-3005**

**Send the electronic copy to: [mtsupremecourt@mt.gov](mailto:mtsupremecourt@mt.gov)**

Application form approved 7/10/93  
Revised 9/15/2009

THERESA L. DIEKHANS  
Assistant Attorney General  
Child Protection Unit  
2300 12<sup>th</sup> Avenue South, Suite 211  
Great Falls, MT 59405  
Telephone: (406) 268-3752

COUNSEL FOR STATE

**MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY**

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IN THE MATTER OF:	)	Case Nos. DDN-12-001(a)
C. V.	)	
YOUTHS IN NEED OF CARE.	)	

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**STATE'S RESPONSE TO MOTHER'S AND FATHER'S BRIEF'S REGARDING  
INEFFECTIVENESS OF COUNSEL**

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**I. INTRODUCTION**

Assistant Attorney General Theresa L. Diekhans respectfully responds to the Mother's and Father's Briefs regarding Ineffectiveness of Counsel provided to them by their previous Attorneys at the Show Cause and Adjudicatory hearing. Both of the parents' Counsels have argued that by the previous attorneys not calling certain witnesses, the attorneys were ineffective and the outcome of the hearing could have been different.

**II. BRIEF IN SUPPORT**

**I. THE BRIEF OF THE PARENTS INCORRECTLY CITES THE APPLICABLE LAW FOR INEFFECTIVENESS OF COUNSEL IN A YOUTH IN NEED OF CARE PROCEEDING.**

A. The Montana Supreme Court does not use *Strickland v. Washington* as the test for ineffectiveness of Counsel in Termination of Parental Rights proceedings but has adopted nonexclusive factors determination.

Parents in Youth in Need of Care proceedings have a due process right to effective counsel under the Due Process Clause of the Montana Constitution. In re A.S., 2004 MT 62, ¶¶ 12, 20, 320 Mont. 268, 87 P.3d 408. However, Counsel for parents are incorrect in relying on



the Montana cases utilizing the two pronged test of *Stickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) as to determine ineffectiveness of the Counsel for this case. For Youth in Need of Care cases the Montana Supreme Court has actually adopted nonexclusive factors for the evaluation of a claim of ineffective assistance of counsel in a termination proceeding. In re A.J.W., 2010 MT 42, ¶ 24, 355 Mont. 264, 227 P.3d 1012. The first factor is consideration of counsel's experience and training representing parents in termination proceedings, and the second is the quality of advocacy demonstrated at the hearing. In re C.M.C., 2009 MT 153, ¶ 30, 350 Mont. 391, 208 P.3d 809. Further, even if a parent can demonstrate that his counsel was ineffective, he cannot prevail unless he suffered prejudice as a result. *Id.*

1. Counsel for Parents are adequately trained and have experience practicing in Youth in Need of Care proceedings.

In this case Counsel's training and experience of the previous attorneys are not on the actual record for hearing as an ineffectiveness claim is no usually considered at the start of a case. However, in this case both Mr. LaFountain and Ms. Berger, the attorneys in question here, have appeared as counsel for numerous parents in these proceedings and have shown themselves to be well versed and knowledgeable in this area of the law. Mr. LaFountain has been the primary attorney of record for the Office of Public Defender's office since before this State's attorney has been practicing in these cases; which she has practicing for been six (6) years. Ms. Berger has been practicing as both a parents' attorney and also as youth's attorney for at least three years that State's counsel is aware of. They have both appeared in hundreds of these cases combined over the years and have shown knowledge and training in the specialized area of Youth in Need of Care proceedings. There is nothing in the transcript or on the record that indicates that either of these attorneys do not have the training and experience to provide adequate representation to parents in these proceedings as required by In re A.S., 2004 MT 62,

268, 87 P.3d 408.

2. The Attorneys provided quality and substantial advocacy for their clients at the hearing.

The Court looks at several aspects of the representation when considering if Counsel provided adequate advocacy for their client. *In re J.J.L.*, 2010 MT 4, 355 Mont. 23, 223 P.3d 921. The Court will look at several aspects of the representation, including whether counsel has met with the client, researched the law, prepared for the hearing by interviewing witnesses and discovering documentary evidence, and demonstrated adequate trial skills. *J.J.L.*, ¶ 19.

In this case there are examples in the transcript where counsel demonstrated all of these skills. At the beginning of the hearing both Mr. LaFountain and Ms. Berger informed the Court that they had received all of the information on the case, have spoken with their clients and that they were prepared to proceed with the hearing. (02/26/12 Tr, at 5-6). Mr. LaFountain even stated he had reviewed DVD's provided by the State in preparation for hearing. (02/26/12 Tr. at 5). A full reading of the transcript from both hearing dates shows that counsel was involved with their clients and this case well before and leading up to the hearing. The testimony of the Child Protection Specialist Kayla Moodie and her Supervisor April Jones shows the department keeping counsel informed as to what was going on in the case leading up to the hearing. (*see* 03/21/12 Tr.at 24-27 & 35-37).

Mr LaFountain also interviewed at least one State's witnesses in preparation for the hearing. (02/29/12 Tr. At 17). Both Ms. Berger and Mr. LaFountain cross examined all of the State's witnesses and made clear, sound legal arguments for dismissal of the case at the conclusion. Mr. LaFountain also filed a motion for increased visitation on behalf of his client prior to this hearing. (3/21/12 Tr. at 27). These Attorneys for the parents showed great advocacy for their clients before and during the hearing.

3. The parents were not prejudiced by their Attorney not calling Dr. Key or the Grandparents to testify on their behalf.

The parents' primary argument that their counsel was ineffective was the attorneys not calling Dr. Key to testify that the youth *may have had* a genetic disorder called Beta Thalassemia. There is no indication in any of the testimony or records that this youth has this disorder. Dr. Key is an obstetrician and gynecologist. He was not the pediatrician for the Youth. The parents' claim that Dr. Key would have testified that this is the reason for the Youth's lack of weight gain and size. There is no offer of proof or support that Dr. Key would have testified in this manner and could have testified to these facts. In actuality, Dr. Anna Antonopulos, a Pediatric Hospitalist, who actually cared for the Youth in both of the hospitalizations, testified to what was actually causing the weight issues and the dehydration. She even stated doing blood tests and determining that the dehydration was most likely due to lack of adequate feeding. (02/29/12 Tr. at 37-41). Dr. Anna also testified as to the concerns about the jaundice and the need to feed the baby every two hours. (02/29/12 Tr. at 35). The nurses at the hospital testified to the training they provided as to the feeding to the baby and their concerns about the Mother's lack of affect and her distraction when trying to talk to her. (02/29/12 Tr. at 63-67 & 71-72). Nurse Practitioner Sarah Goroski testified about talking with the parents about the weight and need for formula. (02/29/12 Tr. at 50-51). Home Health Nurse Davida Hrysko testified about going into the home and working on educating the parents about feeding the baby to keep its weight up and actually making a chart for the parents. (03/21/12 Tr. at 6). The testimony also supports that as long as the baby was receiving adequate feedings her weight would increase. Therefore there is no reason to believe that Dr. Key would have provide any testimony to contradict what the specialists actually dealing with the youth and the parents testified to as to the reason for the baby's weight and size issues.

There is not offer of proof that the grandparents would have provided Judge McKittrick with any information as to the parents ability to parent that would contradicted what the State's 9 witnesses testified to and therefore change the Judge's determination that the Youth was a Youth in Need of Care. There is no indication that the grandparents were witnesses to any of the incidents testified to by the witnesses or that they were in the home when the Youth ended up back in the hospital exhibiting signs of dehydration. There is no reason to believe that had they been called as witness they would have testified to any evidence that would have caused the Judge to dismiss the case.

B. Father is incorrect that the alleged abuse had to be substantiated by direct medical findings.

The Father claims in his brief "that the evidence of alleged physical abuse was not substantiated by any medical findings directly related to the child." There is no statutory or case law that supports an actual finding of harm must be made. M.C.A § 41-3-437(2) states that "the court may make an adjudication on a petition under 41-3-422 if the court determines by preponderance of the evidence...that the child is a youth in need of care." A youth in need of care is defined as "a youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected or abandoned." M.C.A. § 41-3-102(34). Child abuse and neglect is defined as "(i) actual physical or psychological harm to a child; or (ii) substantial risk of physical or psychological harm to a child..." M. C. A. § 41-3-102(7)(a). Therefore no actual injury has to occur as long as there is a substantial risk of harm to the youth. Dr. Anna testified as to the danger posed to a child who is held upside down and the harm that could occur to a child whose head was allegedly hit against the seat in claimed in this case. (2/29/12 Tr. at 31-34). The Youth also had to be hospitalized for at least one night due to the concerns of Dr. Anna. (2/29/12 Tr. at 34-35). Nurse Heather Riggins testified to her concerns that the baby could have fallen out of the

Mother's arms when she was asleep and the Father was in the room. (02/29/12 Tr. at 63). The baby was not injured but it is reasonable to conclude that the Youth could have been substantially injured had the nurse not walked in and discovered the baby in this position. Also there was ample evidence and testimony as to the concerns of the parents understanding how to feed this baby and all of the steps Dr. Anna, Nurse Cynthia Myles, Nurse Practitioner Sarah Gorowski and nurse Davida Hryszko all testified to and how much education they provided to the parents on this issue and yet the Youth still ended up in the hospital with dehydration and her weight fluctuating while all of these providers were working with the parents.

The Court made 65 Findings of Fact in his order signed March 27, 2012 supporting his determination that the Youth was a Youth in Need of Care. The totality of the testimony and evidence presented meets the burden of preponderance of the evidence and there is no legal requirement that a youth suffer actual injury in order for a finding that the Youth is a Youth in Need of care.

### **III. CONCLUSION**

Based on the foregoing Montana State Statutes, Montana Supreme Court cases and the transcript of the hearing the parent attorneys at the time of the show cause and adjudicatory hearing provided adequate representation of their clients. The argument of not calling Dr. Key or the grandparents as being ineffective is not supported by any facts or alleged facts or a showing that if they had provided any testimony to rebutted the State's 9 witnesses that the Judge would have found in their favor and dismiss the case.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

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Theresa L. Diekhans  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of July, 2013, I caused to be delivered a true and accurate copy of the foregoing **State's Response To Mother's And Father's Brief's Regarding Ineffectiveness Of Counsel** to the following:

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